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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

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9 Freeman Holdings of Arizona, L.L.C., dba  
10 Million Air, an Arizona limited liability  
company,

11 Plaintiff,

12 vs.

13 John Does, 1-50; Jane Does, 1-50; Doe  
Entities, 1-50; Joseph Ernest Gamez,

14 Defendants.  
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No. CV-11-01877-PHX-NVW

**ORDER**

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17 On January 2, 2013, the Court ordered Plaintiff and Defendant to show good cause  
18 as to why this action should not be dismissed for lack of jurisdiction (Doc. 101). Before  
19 the Court are Plaintiff's Response to the Order to Show Cause (Doc. 102) and  
20 Defendant's Response to the Order to Show Cause (Doc. 106).

21 **I. BACKGROUND**

22 Plaintiff Freeman Holdings of Arizona, L.L.C. ("Plaintiff" or "Freeman  
23 Holdings") seeks recovery from Defendant Joseph Ernest Gamez ("Defendant") for  
24 allegedly defamatory statements. Plaintiff brought this action against Defendant in the  
25 District of Arizona on September 23, 2011, and filed its Second Amended Complaint on  
26 May 21, 2012 (Doc. 56). Plaintiff asserted that jurisdiction in this Court was proper  
27 under 28 U.S.C. § 1332, alleging that there is complete diversity of citizenship and that  
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1 the jurisdictional amount of \$75,000 is satisfied. (*Id.* ¶ 1.) Since the statements at issue  
2 allegedly intimated that Plaintiff was involved in a criminal offense or was unfit for the  
3 proper conduct of its lawful business, trade, or profession, Plaintiff framed its action as a  
4 case of “defamation per se.” (Doc. 102 at 4.) The prayer for relief indicated that Plaintiff  
5 sought general compensatory and special damages in an amount to be proven at trial, as  
6 well as punitive damages; the complaint offered no amount more specific than damages  
7 “exceed[ing] the minimum jurisdictional amount of \$75,000.” (Doc. 56 ¶ 1, at 11.)  
8 Defendant moved to dismiss the action for lack of subject-matter jurisdiction—in  
9 particular, failure to satisfy the jurisdictional amount (Doc. 82)—but the Court denied  
10 that motion (Doc. 85). More recently, however, Plaintiff acknowledged during a pretrial  
11 conference in open court that it would present no evidence during trial of “special or out-  
12 of-pocket damages.” (Doc. 102 at 4.) The Court then filed its Order to Show Cause  
13 (Doc. 101).

## 14 **II. LEGAL STANDARD**

15 Under 28 U.S.C. § 1332(a), a federal district court has diversity jurisdiction over  
16 an action when there is diversity of citizenship among the parties and the amount in  
17 controversy, excluding costs and interest, exceeds \$75,000. 28 U.S.C. § 1332(a). For a  
18 court to lack subject-matter jurisdiction over an action commenced therein, it must appear  
19 to a legal certainty that the jurisdictional amount is not satisfied. *See St. Paul Mercury*  
20 *Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938). A court will dismiss a suit if  
21 “from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot  
22 recover the amount claimed or if, from the proofs, the court is satisfied to a like certainty  
23 that the plaintiff never was entitled to recover that amount . . . .” *Id.* The Ninth Circuit  
24 described the legal certainty test as follows:

25 Generally speaking, the legal certainty test makes it very  
26 difficult to secure a dismissal of a case on the ground that it  
27 does not appear to satisfy the jurisdictional amount  
28 requirement. Only three situations clearly meet the legal  
certainty standard: 1) when the terms of a contract limit the

1 plaintiff's possible recovery; 2) when a specific rule of law or  
 2 measure of damages limits the amount of damages  
 3 recoverable; and 3) when independent facts show that the  
 4 amount of damages was claimed merely to obtain federal  
 5 court jurisdiction.

6 *Pachinger v. MGM Grand Hotel-Las Vegas, Inc.*, 802 F.2d 362, 364 (9th Cir. 1986)  
 7 (citing 14A Charles A. Wright et al., *Federal Practice and Procedure* § 3702 at 48-50  
 8 (2d ed. 1985)). Accordingly, the Ninth Circuit has allowed a "determination of 'legal  
 9 certainty' when a rule of law or limitation of damages would make it virtually impossible  
 10 for a plaintiff to meet the amount-in-controversy requirement." *Id.* Finally, "[e]vents  
 11 occurring after the filing of the complaint that reduce the amount recoverable below the  
 12 requisite amount do not oust the court from jurisdiction." *Budget Rent-A-Car, Inc. v.*  
 13 *Higashiguchi*, 109 F.3d 1471, 1473 (9th Cir. 1997) (citing *St. Paul Mercury*, 303 U.S. at  
 14 293).

15 Arizona follows the common-law principle allowing a plaintiff to recover  
 16 presumed damages without proof of actual injury in cases of defamation per se. *See*  
 17 *Dombey v. Phx. Newspapers, Inc.*, 150 Ariz. 476, 724 P.2d 562 (1986). Presumed  
 18 damages may be awarded because the average plaintiff in a defamation case has  
 19 difficulty presenting evidence of actual harm that would support a quantifiable award of  
 20 compensatory damages; for example, the loss of reputation is not easily monetized. 1  
 21 John J. Kircher & Christine M. Wiseman, *Punitive Damages: Law and Practice* § 13:14  
 22 (2d ed. 2000). A potential award of presumed damages counts toward the jurisdictional  
 23 amount. Any potential award of punitive damages, which are also available in  
 24 defamation per se cases, also helps to satisfy the jurisdictional amount. *See Gibson v.*  
 25 *Chrysler Corp.*, 261 F.3d 927, 945 (9th Cir. 2001) (noting that punitive damages count  
 26 toward amount in controversy in civil action); *Selby v. Savard*, 134 Ariz. 222, 228, 655  
 27 P.2d 342, 348 (1982) (upholding under Arizona law punitive damages award in  
 28 defamation case). In cases in which the plaintiff is a business entity, no damages for  
 emotional distress, mental anguish, or the like can be recovered. *See HM Hotel Props. v.*

1 *Peerless Indem. Ins. Co.*, 874 F. Supp. 2d 850, 853-54 (D. Ariz. 2012) (holding that  
 2 LLCs and corporations cannot recover emotional-distress damages, as “a corporation  
 3 lacks the cognizant ability to experience emotions”) (quoting *FDIC v. Hulsey*, 22 F.3d  
 4 1472, 1489 (10th Cir. 1994)).

5 While Arizona courts do not appear to have espoused any clear limitations on the  
 6 extent of presumed damages available, the United States Supreme Court has declared in a  
 7 discussion of presumed damages that “the States have no substantial interest in securing  
 8 for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury.”  
 9 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (discussing recovery of  
 10 “purportedly compensatory damages without evidence of actual loss” in defamation cases  
 11 under common law). In a broad discussion of presumed damages in the context of 42  
 12 U.S.C. § 1983 cases, but also referencing defamation cases, the Supreme Court noted  
 13 that:

14 [w]hen a plaintiff seeks compensation for an injury that is  
 15 likely to have occurred but difficult to establish, some form of  
 16 presumed damages may possibly be appropriate. . . . In those  
 17 circumstances, presumed damages may roughly approximate  
 the harm that the plaintiff suffered and thereby compensate  
 for harms that may be impossible to measure.

18 *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 310-11 (1986) (citations omitted);  
 19 see also 2 Rodney A. Smolla, *Law of Defamation* § 9:17 (2d ed. 2012) (“courts . . .  
 20 impos[e] as the guiding principle the notion that presumed damages must serve the social  
 21 policy of compensation”). As such, courts intend presumed damages—which  
 22 compensate for an injury that occurred but is difficult to establish—to approximate in  
 23 value the injury suffered.

24 Punitive damages also may not be awarded arbitrarily; excessive awards of  
 25 punitive damages may violate the due process clause. See *BMW of N. Am., Inc. v. Gore*,  
 26 517 U.S. 559, 562, 585-86 (1996) (Due Process Clause of Fourteenth Amendment  
 27 prohibits state courts from imposing “grossly excessive” punitive damages awards).  
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1 Factors that can help determine an appropriate punitive damages award include: (1) the  
2 reprehensibility of the defendant's conduct—which is generally less for acts causing  
3 economic harm than for violent acts; (2) the ratio of punitive damages to both the actual  
4 harm inflicted on the plaintiff as well as the harm likely to occur; and (3) penalties that  
5 have been imposed for comparable misconduct. *Id.* at 575-76, 580-81, 583. Further,  
6 while the Supreme Court has not placed bright-line limits on punitive damages, “few  
7 awards exceeding a single-digit ratio between punitive and compensatory damages, to a  
8 significant degree, will satisfy due process.” *State Farm Mut. Auto. Ins. Co. v. Campbell*,  
9 538 U.S. 408, 416-17, 425 (2003); *see also Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1,  
10 23-24 (1991) (determining that a punitive damages award of “more than 4 times the  
11 amount of compensatory damages” was not unconstitutional but might be “close to the  
12 line”).

### 13 **III. ANALYSIS**

14 At its core, the jurisdictional question in this action is whether the amount-in-  
15 controversy requirement of 28 U.S.C. § 1332(a) is always satisfied in defamation per se  
16 cases under Arizona law. Put another way, it is whether the amount-in-controversy  
17 requirement is effectively waived in such cases. Here, Plaintiff plans to offer no evidence  
18 of actual harm attributable to allegedly defamatory statements—either as to the type of  
19 harms inflicted or the magnitude of any such harms. Freeman Holdings relies entirely on  
20 presumed damages and a potential award of punitive damages to establish the  
21 jurisdictional amount. Plaintiff would thus have this Court accept jurisdiction in every  
22 Arizona defamation per se case with diverse parties. This is a problematic proposition,  
23 given that federal district courts are courts of limited jurisdiction.

24 Plaintiff has offered precious little support for the contention that this Court has  
25 subject-matter jurisdiction based only on an assertion of presumed and punitive damages.  
26 Plaintiff relies heavily on and quotes liberally from *Schmitz v. Aston*, 197 Ariz. 264, 3  
27 P.3d 1184 (Ct. App. 2000), in an effort to establish jurisdiction. (*See, e.g.*, Doc. 102 at 3-  
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6.) However, that Arizona Court of Appeals opinion was depublished without additional comment by the Arizona Supreme Court. *See Schmitz v. Aston*, 199 Ariz. 431, 431, 18 P.3d 1230, 1230 (2001). It is well-established Arizona law that “a depublished opinion has no precedential effect and cannot be cited as authority in any court.” *FDIC v. Adams*, 187 Ariz. 585, 593, 931 P.2d 1095, 1103 (Ct. App. 1996); *see also* Ariz. R. Civ. App. P. 28(c), (f). All but one of the other cases Plaintiff cites to try to demonstrate that awards in excess of \$75,000 have been granted under circumstances comparable to the ones here are inapposite. For example, Plaintiff cites *Selby v. Savard*, in which the jury awarded \$500,000 in “actual and punitive” damages. *Selby*, 134 Ariz. at 223, 655 P.2d at 343. But the order in that case does not specify that only defamation per se was involved, and it appears that the plaintiff presented a good deal of evidence regarding the medical and job-related problems he attributed to the defendant’s defamatory comments. *Id.* at 223-24, 655 P.2d at 343-44. The evidence the plaintiff presented, including that he had to take sick leave and eventually retire to alleviate the symptoms of stress he argued were caused by the defendant’s defamation, *id.*, makes this entirely unlike the instant action, in which Plaintiff intends to present no evidence of actual harm or loss. Plaintiff’s other cited cases likewise involve multiple claims, with no reason to suppose that the juries made their awards based entirely, or even in part, on findings of defamation per se.<sup>1</sup>

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<sup>1</sup> Plaintiff cites *Sebring v. Pamintuan*, an Arizona Court of Appeals Memorandum Decision that should not be cited as authority or regarded as precedent. *See Sebring v. Pamintuan*, No. 1 CA-CV 07-0478, 2008 WL 2497446 (Ariz. Ct. App. Jun. 17, 2008); Ariz. R. Civ. App. P. 28(c). Even so, the court in that case upheld the jury’s damages award precisely because the plaintiff presented evidence of injury and because the jury could have based its award on the defamation or intentional infliction of emotional distress claims, instead of solely on the challenged defamation per se claim. *Id.* at \*3. In addition, Plaintiff cites a case from the Maricopa County Superior Court, *Desert Palm Surgical Group, PLC v. Petta*, No. CV2008-010464, but the final judgment in that case indicates that the plaintiffs’ claims were for defamation and false light invasion of privacy; there is no mention of defamation per se or of whether the plaintiffs had any evidence of harm. (*See* Doc. 102-2 at Ex. D.)

1 As discussed, Plaintiff will present the jury with no evidence of harm and relies  
2 entirely on presumed damages and punitive damages to reach the jurisdictional amount of  
3 \$75,000. The Court acknowledges the high bar set by the Ninth Circuit under the “legal  
4 certainty” test, and that at least one court in this district has in the past refused to dismiss  
5 a case for lack of jurisdiction under similar circumstances. *See Dealer Computer Servs.,*  
6 *Inc. v. Fullers’ White Mtn. Motors, Inc.*, No. CV07-00748-PCT-JAT, 2008 WL 828732,  
7 at \*3-4 (D. Ariz. Mar. 26, 2008). In *Dealer Computer*, however, the defendants  
8 suggested that the plaintiffs could not prove actual damages, *see id.*; here, Plaintiff itself  
9 has indicated that it will present no evidence of special or out-of-pocket damages. Given  
10 the underlying premises that presumed damages are intended to approximate actual harm  
11 and that there are reasonable limits on punitive damages, it is virtually impossible for  
12 Plaintiff to win a jury award reaching the jurisdictional threshold. Not absolutely  
13 impossible, but virtually so. Further, this has been the case throughout the pending  
14 action; Freeman Holdings cannot satisfy the jurisdictional threshold now, and it would  
15 not have been able to do so at the outset of litigation.

16 The jurisdictional-amount requirement is not automatically met in all Arizona  
17 defamation per se cases with diverse parties. Federal courts are courts of limited subject-  
18 matter jurisdiction. “A federal court’s entertaining a case that is not within its subject  
19 matter jurisdiction is no mere technical violation; it is nothing less than an  
20 unconstitutional usurpation of state judicial power.” 13D Charles A. Wright et al.,  
21 *Federal Practice and Procedure* § 3522 (3d ed. 2009). Declaring that this Court has  
22 jurisdiction in the instant case is tantamount to asserting jurisdiction over all Arizona  
23 defamation per se cases with diversity of citizenship; it is a transgression against “the  
24 allocation of judicial power between the federal and state governments.” *Id.* In the  
25 specific circumstances of this case, Plaintiff does not have and never has had any  
26 evidence of actual damages, which presumed damages are meant to approximate and to  
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1 which punitive damages must be proportional. To a legal certainty, this cannot reach the  
2 amount-in-controversy requirement of 28 U.S.C. § 1332(a).

3 **IV. CONCLUSION**

4 Although the Court does not have subject-matter jurisdiction over this case under  
5 28 U.S.C. § 1332(a), Plaintiff is not harmed by dismissal. Plaintiff has a statutory right to  
6 refile this action in state court within six months of its termination in federal court.  
7 A.R.S. § 12-504. Plaintiff and Defendant will be able to use all of their preparation here  
8 to have a prompt trial, should Plaintiff decide to refile its action in state court.

9 **IT IS THEREFORE ORDERED** that the Clerk enter judgment dismissing this  
10 action for lack of subject-matter jurisdiction under 28 U.S.C. § 1332(a). The Clerk shall  
11 terminate this action.

12 Dated this 18th day of January, 2013.

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16 Neil V. Wake  
17 United States District Judge  
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